CORRESPONDENCE.

LOSS OF FUNDS IN HANDS OF THE COURT.

Editor of the Virginia Law Register:

Referring to your comment on *Patterson* v. *Crawford*, in the REGISTER for January, as to the holding of the court in that case, in substance, "that where there are priorities among the several creditors at whose suit the property is subjected, and a portion of the fund is saved, the same preference is to be observed as if there had been no loss—in other words the loss must be borne in the inverse order of the priorities and equality is not equity in such case," I have to say that the previous case in Virginia bearing on this point, as to the existence of which you say you have a "shadowy impression," is doubtless *Gill* v. *Barbour*, 80 Va. p. 11, which was cited in the briefs and received much attention in the oral argument in *Patterson* v. *Crawford*.

Gill v. *Barbour* is believed to be the only Virginia case bearing on this question prior to the decision of *Patterson* v. *Crawford*.

You will observe that in *Gill* v. *Barbour* the purchaser of the land owned all the debts binding the same save one, and he deposited in bank, with the approval of the court, funds sufficient to pay this debt and such payment into court was recognized as a payment, or the equivalent of a payment, to the creditor. The bank failed and the fund was lost. The court held that the loss should fall upon the owner of the lien. In *Gill* v. *Barbour* the contest was regarded as a contest between a purchaser who had paid all of his purchase money in the mode prescribed by the court and a creditor whose debt was lost by the failure of the bank designated by the court as receiver of the fund.

In the syllabus of *Gill* v. *Barbour* it is said: "Had there remained more than one unsatisfied lien, the loss would then have fallen on the general fund, and been borne by the lienors in the inverse order of the priorities of their liens," and this seems to be borne out by the opinion of Lacy, J. See pages 16 and 17 of the opinion. The court expressly says that the case last mentioned did not present the question of a contest between lienors, as was strenuously insisted by the appellees. The case of *Patterson* v. *Crawford did* present just that question.

It is believed that the same court that decided *Gill* v. *Barbour* would have decided *Patterson* v. *Crawford* just as it has been decided by the present court.

It seems to be conceded that in a case like the one under consideration, the special receiver appointed by the court for the collection and disbursement of the fund represents or acts for all the creditors—not for one more than another—and consequently any defalcation on his part is a loss to the fund as a whole, and *pro tanto* diminishes the fund for distribution without disturbing the order of priority amongst the creditors; the result being that those in the lowest class or classes must bear the loss.

Careful reflection, it is believed, will make it appear that no other general rule than that adopted by the court in *Patterson* v. *Crawford* would work out satisfactory results—results sanctioned by the analogies of the law.

Respectfully yours,

Staunton, Va. FITZHUGH ELDER.